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Equality through precarious work regulation: lessons from the domestic work debates in defence of the Standard Employment Relationship

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Abstract

Precarious work is a crucial impediment to substantive equality. This article examines the regulation of precariousness in light of two recent trends: the casualization of employment in the wake of the crisis and global efforts to regulate domestic work (e.g. ILO Domestic Workers Convention (No 189)). It takes these developments as an opportunity to explore the effective regulation of contemporary labour markets, and in particular the role of the Standard Employment Relationship (SER). The article returns to two prominent accounts of the SER: Vosko's critique of SER-centrism in non-standard work regulation and Bosch's notion of the flexible-SER. It argues that the domestic work debates confirm the value of a modernised SER in its temporal dimensions. Yet the literature on precarious work tends to focus on regulatory settings in which the standard model remains dominant. The key contemporary challenge is to identify strategies that will embed this model in settings in which it is in decline or was never deep-rooted. Drawing on the notion of 'reconstructive labour law,' the article argues for innovative legal mechanisms that prompt the construction of flexibilised SER-type relationships. It concludes, however, that for these strategies to be effective, casualization must be identified not only in contractual arrangements but also in working time practices.

Introduction

The curbing of precarious employment is a prerequisite for substantive equality. It has long been recognised that regulatory measures to tackle precariousness should be at the heart of the equality project (Fredman 1997; Fudge and Owens 2006). This article explores the legal regulation of precariousness in the post-crisis era. The article emerges from the confluence of two trends, which it argues to be of fundamental significance to contemporary labour market regulation: the intensified casualisation of employment in the wake of the global economic crisis and the recognition of domestic work as a site of legal regulation.

The recent growth in precarious work is part of a broader historical trend: during the 'boom years,' historic levels of economic growth were not matched by an increase in secure jobs (Ghosh 2013). Yet the crisis has intensified the growth in 'non-standard' forms of employment, including through the conversion of secure jobs into casual contracts, solo self-employment, piece-work etc. (Ghosh 2013; ILO 2011). Women, further, tend to be much more heavily represented in non-standard work (on the increase in part-time work since the financial crisis see Ghosh 2013, Figure 5; see also ILO 2012). A risk to sustainable growth through its dampening effects on aggregate demand, the rise in precarious employment is equally a barrier to gender equality (Ghosh 2013). Equality gains will inevitably falter in the face of an unchecked

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expansion of precarious work, through a combination of the transfer of risks to women hired in non-standard configurations, a “suction effect” that will diminish standards across the labour market as a whole (Bosch 2004, p 631), and the impairment of anti-discrimination frameworks that rely on comparative mechanisms.

The contrasting trend towards the regulation of domestic work is substantially led from the transnational level, where it has generated the International Labour Organization (ILO) Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201), and spurred a debate on the scope of the European Union (EU) working conditions instruments, the Working Time Directive (WTD)² and Pregnant Workers Directive (PWD).³ Sensitivity to the gendered nature of domestic work permeates these debates. Indeed, the discourses that circle domestic work can be read as ‘re-gendering’ the policy debates on non-standard work regulation, which was previously pursued in increasingly gender-neutral terms (on the retreat from gendered notions of part-time work under the EU equal treatment framework, see McCann 2008).

This article interrogates these twin trends by investigating the role of the Standard Employment Relationship (SER). The central preoccupation is this ‘standard model’ in its form as a paradigm of the wage-labour relationship: an open-ended engagement stretched across a full-time work-week and organised in a regular and predictable pattern of working hours (see further Bosch 2004). The article returns to two contrasting elaborations of the contemporary role of the Standard Employment Relationship, by Vosko (2010, 2011) and Bosch (2004). Drawing on these contributions, it argues for a refined analysis of the regulatory presence of the standard model. The article contends that the Standard Employment Relationship should be accorded a pivotal role in regulating fragmented labour markets. In this regard, it points to a novel - reconstructive - role for labour law, in which a central objective of regulatory intervention is to build coherent and protected working relationships from intermittent episodes of economic exchange.

To this end, Section One outlines Vosko’s critique that non-standard work laws embody “SER-centrism”: an adherence to the standard model that undermines the protective capacities of these frameworks. Section Two makes a case for the centrality of an adjusted version of the Standard Employment Relationship in the regulation of non-standard work, not least to improve the working lives of women. Refining Bosch’s notion of the ‘flexible-SER’ for the context of fragmented labour markets, Section Three sketches the demands of ‘reconstructive labour law.’ The article’s Conclusions include an indication of the limits of this analysis and suggestions for future research.

1. ‘SER-centrism’ in non-standard work regulation

² Council Directive (EC) 93/104 concerning certain aspects of the organisation of working time [1993] OJ L307/18.

³ Council Directive 92/85 (EEC) on the introduction of measures to encourage improvements in the safety and health of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391) [1992] OJ L348/1.

The recognition that non-standard workers have been subordinated by labour law frameworks, and a widespread acceptance that waged work should more readily align with caring responsibilities, have coalesced in recent decades to found a pervasive suspicion of the Standard Employment Relationship. The model is rejected principally for the gender norms it has embodied, which have rested solidly on the male breadwinner/female caregiver paradigm (e.g. Bosch 2004; Fudge and Owens 2006). The unease embraces the Standard Employment Relationship in its guise as a model for labour market regulation. A strand of the literature centres on the model as it has been embedded in labour law frameworks, to demonstrate that this normative model has functioned to exclude the vulnerable, and predominantly women, from legal protection (see in particular Fredman 1997; Fudge and Owens 2006).

These deficiencies in labour law frameworks were exposed during the period since the late 1980s in which spiralling labour market fragmentation in the advanced industrialised economies exhausted the capacity of conventional labour law structures to protect significant proportions of the workforce, while the quest for labour market flexibility precluded coherent legal reform (Fredman 2006; McCann 2008). Simultaneously, labour market policy actors were slowly persuaded of the need to extend labour market policy to embrace the ‘informal sectors’ of low-income countries and, by extension, the diverse working relations characteristic of informal work (ILO 1999). Subsequently legal frameworks were devised that aimed simultaneously to liberalise non-standard work and to address exclusion and disadvantage (see Murray 1999; Vosko 2006; McCann 2008). The European Union (EU) embarked on a stuttering legislative project in the early 1980s that ultimately generated a transnational-level frame for Member State regulation of part-time,⁴ fixed-term⁵ and temporary agency work.⁶ Beginning in 1994, the International Labour Organization (ILO) adopted standards on home work,⁷ part-time work,⁸ private employment agencies,⁹ the employment relationship¹⁰ and, most recently, domestic work.¹¹ Similar measures have been adopted at the national and sub-national levels across the OECD (including in Australia, Canada, Japan, and Korea).

Scholars have soundly critiqued the exclusionary dynamics of the Standard Employment Relationship as it was enshrined in the labour law frameworks perfected in the mid-twentieth century. More recently, however, concern has been expressed about the enduring presence of the model in the project of non-standard work regulation, and consequent incapacity of these frameworks effectively to curb labour market precariousness. This claim is particularly compelling, since the project of non-standard work regulation, at least in policy rhetoric, is commonly framed as a lifeline for precarious workers.

⁴ Council Directive (EC) 97/81 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP AND THE ETUC [1998] OJ L14/9.

⁵ Council Directive (EC) 99/70 concerning the Framework Agreement on fixed-term work concluded by ETUC, UNICE and CEEP [1999] OJ L175/43.

⁶ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work OJ L372, 5 December 2008, p. 9.

⁷ Home Work Convention, 1996 (No. 177) and Recommendation (No. 184).

⁸ Part-Time Work Convention, 1994 (No. 175) and Recommendation (No. 182).

⁹ Private Employment Agencies Convention, 1997 (No. 181) and Recommendation (No. 188).

¹⁰ Employment Relationship Recommendation, 2006 (No. 198).

¹¹ Domestic Workers Convention, 2011 (No. 189) and Recommendation (No. 201).

This important critique has been contributed by Vosko (2010, 2011). While accepting that alignment with the Standard Employment Relationship can improve the position of some precarious workers, Vosko argues that the standard model has functioned in non-standard work regulation primarily to protect individuals whose working patterns and relations most closely match the contours of the model. The regulatory responses to non-standard work remain tied to the standard model and its labour force participation norms, particularly those of female caregiving, citizenship and age-based differentiations. Her conclusion is that domestic and transnational social policy should abandon the Standard Employment Relationship, together with any aspiration to a unitary model of employment.

Vosko offers two linked critiques. The first is at the level of state intervention across the range of cognate policy spheres – worker protection, gender relations, childcare, training, social security, migration etc. At this level, she argues, SER-centrism operates by conflating working relations that are non-standard with those that are precarious. Laws and policies conceptualise precarious employment as driven primarily by deviation from the Standard Employment Relationship. In consequence, policy actors rely primarily on non-standard work laws to combat labour market precariousness. These legal regimes are thereby decontextualized; oblivious to the drivers of non-standard work. Part-time work regimes are not designed to disrupt the association of part-time hours with the gendered division of domestic labour. Fixed-term work laws are adrift from state policy on migration, despite the prevalence of migrant workers in the temporary labour forces of receiving countries. Labour market precariousness, in an SER-centric policy world, is addressed exclusively as divergence from the standard model.

Vosko's second critique targets regulatory design as an adjunct of this broader tendency to conflate precariousness and non-standard work. Framing the Standard Employment Relationship – or close proximity to it – as a solution to precariousness, non-standard work regimes operate primarily to nudge forms of employment that fall just outside the standard model within its range. The outcome is that those in working relations that deviate sharply from the Standard Employment Relationship are the least likely to benefit.

Vosko substantiates this contention by highlighting aspects of non-standard work regimes that privilege SER-proximate workers. One illustration is embedded in measures that proscribe discrimination against non-standard workers.¹² Vosko highlights the comparative mechanism on which these regimes hinge, by mandating equality with individuals whose employment relationships mirror the Standard Employment Relationship in the relevant dimension (e.g. part-time workers with full-timers etc.). The necessity to identify a comparator renders these regimes capable of aiding only limited numbers of workers (see further McCann 2008). Further, as Vosko notes, the permissible comparator – the “comparable worker” – is defined, in the more constrained of these instruments, to demand additional affinities with the non-standard worker. Thus in the Part-Time Work Convention, the “comparable worker,” is configured as a full-time worker, *inter alia*, in “the same type of employment

¹² On the Equal Treatment strategy in non-standard work regulation, see Section Three below.

relationship” as the part-timer.¹³ This notion of an employment relationship in the Convention was equated with the duration of employment, thus distinguishing between open-ended and fixed-term contracts (whether temporary, seasonal or casual) (ILO 1994, para 38). The outcome is that the Convention entitles only part-time workers who are engaged on a permanent basis to compare their terms and conditions with the class of employees likely to be in the most advantaged position: permanent full-timers. Part-timers who are also engaged on a fixed-term basis are restricted to comparisons with other temporary workers.¹⁴

The EU non-standard work regime showcases another incarnation of regulated SER-centrism, in this case emerging from the instruments in the guise of an integrated normative regime. As Vosko points out, the earlier instruments - the Part-Time Work and Fixed-Term Work Directives - introduced open-ended entitlements to equal treatment (in “employment conditions,”¹⁵ understood expansively to embrace all labour-related entitlements with the exception of social security rights (Commission of the European Communities 2003)). The Temporary Agency Work Directive, in contrast, entitles temps to equality only in “basic working and employment conditions,”¹⁶ which are defined to embrace working time, pay, the health and safety aspects of maternity protection, access to employer-provided child-care facilities and, by virtue of an earlier Directive,¹⁷ health and safety protections (see further Countouris & Horton 2009; Vosko 2009; McCann 2012). At the national and sub-national levels, too, efforts to expand labour law protections to non-standard workers tend to founder on a perceived need for affinity with the existing protected workforce. Vosko points to the Canadian experience, in which proposed reforms to expand the scope of the federal Labour Code have circled conventional judicial conceptions of employment (Canada 2006).¹⁸

Vosko’s analysis confirms that the mechanisms so far designed to regulate non-standard work tend either to preclude or impede protection for individuals in working relationships distant from the standard-form (see also McCann 2008). As she argues, such SER-centric approaches to regulation are least likely to improve wage-work relationships that deviate sharply from the employment model: “the greater the deviation from the SER and its associated participation norms, the lower the level of protection they provide” (Vosko 2011, p 59).

This article takes Vosko’s important contribution as its point of departure. The aim is to investigate further the role of the Standard Employment Relationship in non-standard work regimes and, by extension, in contemporary labour market regulation. The focus is Vosko’s second – regulatory design – critique. The premise is that it is of some urgency to refine the analysis of SER-centrism, due to the coincidence of two

¹³ Convention No 175, Article 1(c)(i). See also Recommendation No. 182, Clause 2.

¹⁴ A similar formula, with comparable effects, is contained in the EU Part-time Work Directive, note 4 above. See further McColgan (2000).

¹⁵ Council Directive 97/81/EC, *ibid*, Clause 4(1); Council Directive 99/70/EC, note 5 above, Clause 4(1).

¹⁶ Article 5(1).

¹⁷ Council Directive (EEC) 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship [1991] OJ L 206/19.

¹⁸ “[P]ersons who perform services comparable to those provided by employees and under similar conditions,” Canada 2006, p 64, cited in Vosko 2010.

recent trends of contrasting logic: the intensified casualisation of working relations in the wake of the global financial crisis and the entry of domestic work into the congregation of regulated non-standard work-forms.

The spreading casualization in the wake of the crisis points to the complex problem of divining the regulatory frameworks suited to profoundly fragmented labour markets. It has become essential, that is to say, properly to understand the regulatory options for settings in which the Standard Employment Relationship has already substantially been abandoned or historically exercised little influence. Conceived in the months after the financial crisis, the ILO Domestic Workers standards have triggered important global efforts to regulate one of the domains of casual work, spurring debate and legal reforms at the domestic and transnational levels that may illuminate this problem (on the EU debates, see European Parliament 2010; McCann 2012). Signifying both an international-level endorsement of the state's capacity to regulate care work in the private sphere, and a recognition of the hostile conditions prevalent in a major source of women's employment across the developed and developing worlds, the project of domestic work regulation is also the single most significant contemporary attempt to engage with the regulatory demands of profoundly casualised and informal working relations.¹⁹ This moment of concerted political will to regulate domestic work, then, presents an opportunity to explore and speculate on frameworks and techniques for the regulation of fragmented labour markets.

It has been argued elsewhere that projects of non-standard work regulation should be integrated into broader analyses of the evolution of labour law in the post-crisis era. As a research strategy, this approach can illuminate both the risks that non-standard work laws pose to 'mainstream' labour law frameworks and the potential of these regulatory projects to generate innovative regulatory strategies (see further McCann 2012). This article pursues such an 'holistic analysis' of domestic work regulation to argue, in contrast to Vosko, that SER-centrism should be a central feature of non-standard work laws. Further, it contends that SER-centrism promises to strengthen the protection of a group of workers whose arrangements diverge profoundly from the standard model, namely those in casual work.

2. Selective nostalgia: in defence of the Standard Employment Relationship

Reflecting on the evolution of labour law in an era when the fragmentation of the waged labour relationship was less advanced, Hepple (1995) cautioned that labour law's future would not be built from nostalgia for the values of the past. This article argues for a "selective nostalgia," which sifts through the eroding regulatory regimes and discourses of the post-crisis era to identify the values, norms and regulatory strategies that should be preserved.²⁰ Such an evaluation would extend to the Standard Employment Relationship, as both normative model and prompt to regulatory strategy. The impetus is the fear of an unduly hasty, or too comprehensive, dismissal of the Standard Employment Relationship, in an urge to protect groups that the regulatory embedding of this paradigm has marginalized. To dismiss entirely the

¹⁹ The Employment Relationship Recommendation, note 10 above, purports to offer a regulatory framework for these working arrangements, with less success.

²⁰ Hepple may have been advocating a similar approach: he recommended "a close analysis of the present and an understanding of the past," p 629.

enduring relevance of the ‘industrial model,’ it is argued, risks hastening the loss of an imagery essential to preventing the further deterioration of working life among a substantial element of the labour force, including the most disadvantaged.

This Section pursues the enduring relevance of the Standard Employment Relationship as it is emerging in the expansion of non-standard work regulation to embrace domestic work. The underlying research has its origins in a contribution to the standard-setting exercise that generated the ILO Domestic Workers standards. That project produced a study on *The Legal Regulation of Working Time in Domestic Work* (WTDW), which elaborated a conceptual framework for regulatory intervention and a set of principles to underpin legal reform (see McCann and Murray 2010, 2014). The project also generated a range of interconnected regulatory strategies, characterised as a ‘Framed Flexibility’ model, which is grounded in the needs and vulnerabilities of domestic workers and the demand for their labour.²¹

The starting point for that investigation was the available data on working time, which, although sparse, confirms the working hours of domestic workers to be problematic in both duration and scheduling. Domestic workers’ hours are frequently excessive or even completely open-ended. They are also unpredictable and embrace substantial periods of ‘on-call’ or ‘standby’ time (during which workers remain available to the hirer to perform the central tasks of their job) (see ILO 2009, 2013). Their working hours therefore limit the capacity of domestic workers to sustain adequate family and private lives, whether to engage in family-building, to undertake caring responsibilities or simply to preserve a dimension of their lives distinct from their engagement in waged labour. It is notable, further, that the unpredictability of domestic workers’ hours has a distinct impact: where it is impossible for these workers to predict when they will be relieved of paid work, the quality of their time beyond waged labour is undermined (e.g. Clement et al 2009).

These divergences from the temporal dimensions of the Standard Employment relationship have been instrumental in the exclusion of domestic workers from protective legal frameworks. Indeed, domestic work tends to be exiled by working time regimes even when it comes within the ambit of other labour law sub-fields (ILO 2009, 2013).²² The most prominent illustration of this dynamic is the EU legal order: domestic workers are covered by a range of labour law Directives, yet specifically excluded from the working conditions norms, the Working Time²³ and Pregnant Workers²⁴ Directives (see further McCann 2012). This outcome, then, represents the exclusionary brand of SER-centrism highlighted by Vosko, which holds domestic workers hostage to a policy narrative of their working hours as inescapably ungovernable. The WTDW study found the apt regulation of domestic work, however, to be inchoately theorised in the academic literature, and the international-

²¹ The Framed Flexibility Model has been elaborated in an illustrative Model Law, available at <https://www.dur.ac.uk/resources/law/ModelLawonWorkingTimeinDomesticWork.pdf> [last accessed 15 July 2014] [WTDW Model Law].

²² An illustration is the EU regime, in which domestic workers come within the scope of most labour law Directives, yet are excluded from the Working Time and Pregnant Workers Directives. See further McCann 2012.

²³ Note 2 above.

²⁴ Note 3 above.

level debates on the ILO instruments exposed widespread confusion among policy-makers about the rationales and strategies of working time regulation (ILO 2009).²⁵

As part of its response to this conceptual and strategic confusion, a central conclusion of the study was that a ‘standardisation strategy’ should be adopted for domestic work under which an adjusted version of the Standard Employment Relationship would underpin legal frameworks. This Section returns to the call for standardisation, to reflect on it in more depth and to situate it within the academic debates on the role of the standard model in the regulation of contemporary labour markets.

To this end, it is worth returning to certain of the proposals for legal regulation contained in the WTDW study. The first is uncomplicated: to subject domestic work to conventional hours limits and rest periods, albeit subject to derogations to accommodate the unpredictable demands of caring labour.²⁶ This proposal draws on Bosch’s pivotal distinction between substance and form in the Standard Employment Relationship (2004). The substance of the standard model, Bosch asserts, is determined by its functions. These he configures to embrace the model’s traditional role of (1) protecting employees against economic and social risks, (2) reducing social inequality and (3) increasing economic efficiency, and to advance two objectives that are tailored to contemporary labour market objectives, of (4) ensuring equal access to employment for men and women and (5) supporting lifelong learning.

Bosch’s central insight is that while the *substance* of the Standard Employment Relationship remains relevant to early twenty-first century labour markets, its *form* is susceptible to evolution. To structure contemporary labour markets, he proposes a ‘flexible SER,’ which adjusts the standard form as necessary, while retaining its protective elements. Thus with regard to the central concerns of this article - the standard model’s temporal and organizational dimensions – Bosch observes that the traditional model rested on full-time employment and on modes of work organization grounded in the eight-hour day or full-time week. To found a revived Standard Employment Relationship, he suggests measures to promote internal flexibility, extend opportunities for individuals to select their working hours, and facilitate a more fluid distinction between full-time and part-time work.

In calling for the imposition of derogable hours limits on domestic work, then, the WTDW study borrowed the logic of the flexible-SER. This proposal recognises that a decent working life necessitates constraints on the availability of the regulated worker’s labour that are sufficient to protect her health, wellbeing and private time. To that end, the Framed Flexibility model retains the principal temporal attributes of the standard model (certainty, regularity, and the preservation of social and community time), while recognising that forms of domestic work that involve personal care must escape the strictures of standardized working time, at least periodically.

²⁵ The ILO’s initial report towards the standard-setting process identified a need for “particular guidance on identifying, limiting and appropriately calculating working time for domestic workers” (ILO, 2009).

²⁶ The WTDW Model Law (note 21 above) provides an illustration of normal working time limited to eight hours per day (s 3.1) with exceptions permitted for domestic workers who are engaged on collectively-agreed hours averaging schemes (ss 3.2, 9).

The second proposal in the WTDW study is more novel. The study offered a classification of temporal features of domestic work that are susceptible to regulatory intervention: unpredictable hours (daily, weekly, annual); extensive spans of hours or split shifts (in which the domestic worker performs daily hours across fragmented time periods); long and unpredictable periods of on-call duty; and excessively short hours, paired with the related low income. Recognising that the techniques characteristic of conventional labour law frameworks do not adequately grasp, or respond to, fragmented working patterns of these kinds, it has been suggested that regulatory measures should be designed specifically to allay fragmentation (see McCann and Murray 2014, pp 21-22).

This proposal spawned a set of interlinked legal strategies. One suggestion is to prohibit hiring on a casual ('as and when required') basis, to ensure that domestic workers are certain of their schedules in advance and escape the precarious incomes associated with casual work.²⁷ To prevent very short hours, it is proposed that domestic workers should be compensated when they report for work to find that they are required for only a few hours.²⁸ Finally, a 'unitary model' of working time was championed, under which on-call hours count fully towards working hours and wages. The aim is to avert the potential for fragmentation that is latent in legal strategies that purport to bifurcate working time into 'active' and 'inactive' components.²⁹

Most significantly for present purposes, the WTDW study encouraged experimentation with legal mechanisms that are designed to prompt the construction of (flexibilised) SER-type relationships from fragmented daily schedules. These techniques cannot be derived from conventional labour law frameworks, in which 'standardisation' has inevitably been of little import. A degree of innovation is therefore essential, to devise fresh techniques suited to this newly urgent objective.

The study proposed one such novel regulatory method: a system of incentives for hirers to schedule working hours continuously.³⁰ A regulatory model was designed to identify a span of hours over which the domestic worker's daily hours are, optimally, to be scheduled, and to mandate stricter daily hours limits for those who perform work outside of this span.³¹ This model is animated by a broader principle of 'innovative regulation,' which recognises the regulatory response to domestic work as necessarily complex and uncertain, and therefore inescapably to entail a degree of experimentation (McCann and Murray 2010; see further Fenwick et al 2007, Lee and

²⁷ WTDW Model Law, s.10.3.

²⁸ WTDW Model Law, s 10.2.

²⁹ WTDW Model Law, Part C, Chapter 1. This approach stresses that working time regulation should not be grounded exclusively in the arduousness of waged labour, but should also recognise working hours as time during which the worker is removed from her family and other elements of her private life, McCann and Murray (2014).

³⁰ WTDW Model Law (note 21 above), s 10.4.

³¹ The WTDW Model Law (ibid) identifies a span of 9 hours over which the worker's daily hours are to be scheduled. Individuals whose hours are scheduled beyond the 9-hour span are subject to a normal day of 7 hours, rather than 8 hours. He or she can also elect to work an 8 hour day and be compensated by additional annual leave. These provisions are accompanied by an absolute limit on the daily span of 13 hours. Clause B. 10.4, 10.5.

McCann 2011, Frey 2011).³² The model can also be aligned with modern labour law scholarship's heightened recourse to regulatory theory, specifically, to the line of research that investigates the potential of financial and other incentives as tools of effective regulation (see e.g. Howe 2006). It brings to this literature – most often examining government contracting – an interest in modes of incentivisation that are tailored directly at influencing the choices of private employers.

What, then, do these proposals for regulatory strategy contribute to the academic debates on the regulation of fragmented labour markets and precarious work? One of the central insights of the WTDW research, implicit in the study, was that the effective regulation of domestic work demands a theory of the Standard Employment Relationship in contemporary labour regulation. The overarching objectives of regulatory intervention in the domestic work sphere were identified as preserving worker health and well-being, ensuring a decent and predictable income, limiting uncertainty, sustaining meaningful family and private lives and facilitating unpaid domestic labour. The process of reflection on how to regulate domestic work, prompted by the debates on the international standards, confirms the Standard Employment Relationship as the regulatory model that is capable of realising this set of outcomes.

In this light, it becomes apparent that underlying each of the mechanisms just discussed is an aspiration to construct the Standard Employment Relationship. Embedding a flexible-SER as a model for regulatory frameworks is the most convincing method of ensuring the constrained working hours and coherent schedules that are essential to a decent working life and to gender equality. At least in its temporal, organizational and remunerative dimensions, then, the Standard Employment Relationship should be understood as intrinsic to effective labour market regulation. Through the domestic work project, the flexible-SER is confirmed as an ideal, which can be taken to be both an envisaged outcome of regulatory intervention and a model for the design of legal frameworks. The challenge at this juncture is to determine the regulatory strategies that have the capacity to embed the flexible-SER in contemporary labour markets.

3. Towards 'reconstructive labour law': specific regulation strategies in fragmented labour markets

Bosch's elaboration of the flexible-SER dates from a decade ago, when the pressures towards labour market fragmentation were neither so intense nor widespread. His central preoccupation, further, is the welfare regimes of continental Europe, in which the standard model has survived comparatively unscathed, even in the wake of the crisis (Rubery 2011).³³ Bosch's frame of analysis is shared with much of the literature on non-standard and precarious work: implicitly, it envisages regulatory contexts in which the Standard Employment Relationship remains dominant, if under intense pressure, and associated with gender norms that inhibit women's labour market

³² It was suggested that the complexity of regulating domestic work demands that regulatory outcomes be subjected to a process of empirical testing and incremental reform (see further Fenwick et al 2007; Frey 2011; Lee and McCann 2013).

³³ Bosch characterises the UK as having undergone a "wholesale undermining" of the Standard Employment Relationship (2004, p 631).

participation. The central concern of this literature, in consequence, is the standard model's exclusionary dynamics. It therefore gravitates towards exploring mechanisms to relax the standard model's strictures, and thereby to renew its influence. The strategies it explores are tailored to uphold the substance of the Standard Employment Relationship, while endowing it with a flexibilised form.

This article departs from the bulk of the precarious work literature in this regard. It revisits the flexible-SER in the wake of the crisis; after a decade of scholarly work that has elaborated the regulatory demands of precarious work and informality; and with a focus on fragmented labour markets, in which the Standard Employment Relationship is elusive, contested or defeated. In this context, the regulatory strategies that were outlined above approach the problem of the standard model's enduring influence by a different route. They are not tailored to slacken, but rather to solidify, the model, in contexts in which it has as already been abandoned, or has failed to seed in the major part of the workforce (schematically, respectively the market liberal regimes of the advanced industrialized world and the 'informalized' labour markets of the global South).

This call for an 'SER-constructive' approach has implications for regulatory strategy. In noting that the form of the Standard Employment Relationship is susceptible to evolution, Bosch was only tangentially interested in regulatory design. He counts legal regulations among the "stabilizing elements" that have sustained the Standard Employment Relationship, and deregulation as a factor in its decline (2004, pp 618, 627). Bosch does not attempt to design a blueprint of how effectively to regulate to sustain, retrieve, or construct this model. It is apparent, however, that regulatory design is crucial to the (re)construction of the Standard Employment Relationship in fragmented labour markets. The process of identifying the most effective legal frameworks is especially urgent if they are to be tailored to the labour markets of low- and middle-income countries - the subject of serious research efforts that are beginning to generate detailed proposals for regulatory experimentation (see Fenwick et al 2007; Tekle 2010; Lee and McCann 2011; McCann et al 2014).

To begin the reflection on the kind of strategies that might be needed, it is worth returning to a typology, elaborated elsewhere (McCann 2012), of the mechanisms that have been integrated into labour law schema in recent decades to regulate non-standard work. This typology identifies three dominant strategies:

- (1) Expansion: the extension of generally-applicable norms to non-standard workers (to establish universal minimum standards);
- (2) Equal Treatment: the enactment of legal entitlements for non-standard workers to be accorded equal treatment with comparable standard workers; and
- (3) Specific Regulation: the design of regulatory measures and techniques tailored to the specificities of distinct non-standard work-forms.

Drawing on the typology, the SER-centrism critique outlined in Section One comes into sharper focus, and its relevance and scope can be elaborated in more detail. It is apparent that this critique is valid (if not inevitable) when levelled at the Expansion and Equality strategies. Yet a form of SER-centrism, it can be argued, is essential to strategies of Specific Regulation.

The Specific Regulation strategy has not taken centre stage in legal interventions on non-standard work. The Equal Treatment approach in particular has become the default protective mode in settings in which non-standard work has been acknowledged as a valid object of regulatory policy. The prominent exception is the EU Fixed-Term Work Directive, which hosts a standardisation strategy to accompany its equal treatment framework (see further Murray 1999; McCann 2008). By limiting the renewal of fixed-term contracts, the Directive implicitly upholds the Standard Employment Relationship in the duration dimension, by favouring its legal analogue, the indefinite contract.³⁴

Yet it can convincingly be argued that the Specific Regulation strategy is crucial to fragmented labour markets (McCann 2008, pp 140-141, 167-168; see also Ewing 1996, 95-96). There is a critical role for labour law, it has been contended in this article, in building the Standard Employment Relationship from diverse work-forms (or in novel zones of regulation). This insight is compelling for the investigation of SER-centrism, in that it mitigates against the proclivities of the standard model identified by Vosko in the other strategies of non-standard work regulation. Rather than the further marginalisation of profoundly non-standard work that Vosko highlights in the unfurling of the Expansion and Equal Treatment Strategies, it has been suggested that the Specific Regulation strategy should embrace this model to encourage the construction of SER-type relationships.

Further, as signalled earlier, it can be contended that SER-centrism has the potential to aid a section of the labour force that profoundly diverges from the Standard Employment Relationship - the casual workforce, called upon by hirers to work as and when required (Burchell et al 1999). The WTDW study recognised and investigated domestic work as a form of casual work: frequently performed on an informal basis, without a contract, as and when required, in the absence of any continuing expectations of work. This article contends that the role of regulatory intervention in fragmented labour markets should be understood, centrally, as building a coherent working relationship from intermittent or unpredictable episodes of economic exchange. Labour law, it is argued, should assume a new role: a reconstructive role, which builds from a series of dispersed engagements a coherent and protective working relationship (see further McCann and Murray 2014).

The need for specific regulation, as an element of this broader legal policy objective, is only beginning to be appreciated. Most prominently, recent policy and public debate in the UK has centred on whether and how to regulate casual work, characterised as ‘zero-hours contracts.’ Legislation presently before Parliament singles out these forms of work.³⁵ The stated aim is to tackle the disadvantage encoded in casual work (Department for Business, Innovation and Skills, 2014). Yet the draft legislation targets only the facet of ‘exclusivity,’ by prohibiting employers

³⁴ Note 5 above, Clause 5 (‘Measures to prevent abuse’). The Directive offers Member States a choice of mechanisms to achieve this goal: requiring objective reasons to justify the renewal of fixed-term contracts; limiting the maximum total duration of successive contracts; or limiting the number of renewals, Clause 5(1).

³⁵ Zero hours contracts are defined as contracts under which ‘(a) the undertaking to do or perform work or services is an undertaking to do so conditionally on the employer making work or services available to the worker, and (b) there is no certainty that any such work or services will be made available to the worker’, Small Business, Enterprise and Employment Bill, Section 139(2).

from preventing ‘zero hours’ workers from working for another hirer.³⁶ More fundamental aspects of the broader casualization of work have so far been overlooked in this regulatory project.³⁷ Freedland (2014) has pointed to the need for clarification of the employment status of these workers. Yet a comprehensive approach towards the broader casualization of work would also demand that casual working relations are understood as emerging not only from hiring or contractual strategy but also from hours scheduling.

Labour law scholarship has tended to address casual working relations as they emerge, and are regulated, on the plane of contractual form (Davies 2007; McCann 2008). Yet casual work, if it is to solidify as a legal concept or object of legal intervention, should be conceptualised also as a function of the arrangement and predictability of working hours, and of the capacity of the employer to fragment those hours (McCann and Murray 2014). This conception can sustain strategies, such as those outlined in Section Two, to address the disintegration of the employment relation into casualised engagements, irrespective of whether these working relationships are framed within an enduring contractual relationship.

Conclusions

Designing frameworks and techniques to regulate casualised work and fragmented work forces is one of the central challenges of contemporary labour law. It is a challenge, further, whose urgency has intensified in the wake of the financial crisis. In particular, casualisation represents a profound obstacle to gender equality, given the disproportionate presence of women in non-standard forms of work. This article has examined contemporary labour law in the light of both the intensified casualization of working relations in the wake of the recession, and the recognition of domestic work as a site of legal regulation, the latter of which it configures as the most important contemporary effort to engage with profoundly casualised and informal working relations. Building on earlier work towards conceptualising domestic work regulation, the article has approached the challenge of labour market fragmentation by investigating the role of the Standard Employment Relationship (SER) in contemporary labour law. It has argued for the retention of a modernised version of this model as both an image of optimum regulatory outcomes and a prompt to regulatory technique.

To elaborate these ideas, the article has drawn on contrasting assessments of the contemporary relevance of the Standard Employment Relationship found in the work of Vosko and Bosch. Vosko offers the useful analytical tool of ‘SER-centrism’ to the evaluation of labour law frameworks, and in particular of those elements that are purported to protect non-standard workers. She highlights that the enduring influence of the Standard Employment Relationship on the project of non-standard work regulation constrains these frameworks from effectively curbing precariousness, by protecting primarily individuals whose working relations most closely match the standard model. Bosch has elaborated the distinction between substance and form in the Standard Employment Relationship. He reveals the enduring relevance of this

³⁶ Ibid.

³⁷ The Bill also contains a power to make further provision in relation to zero hours workers, *ibid.*

model's functions while arguing for a reconfigured form – the 'flexible-SER' - that discards the gendered assumptions of the traditional model. This article has developed Vosko and Bosch's work to investigate the role of a 'flexible-SER' in non-standard work regulation and, more broadly, fragmented labour markets.

To do so, the article has explored the Standard Employment Relationship as it is emerging in the expansion of non-standard work regulation to embrace domestic work. It has argued that the domestic work debates confirm that sustained loyalty to the standard model is imperative. The model emerges as the regulatory paradigm capable of realising a set of objectives that are crucial (although not sufficient) to advancing gender equality, in particular by facilitating unwaged and caring labour.

In contrast to Vosko's analysis of the most prominent non-standard work regimes, it has further been argued that the regulatory embedding of the Standard Employment Relationship holds promise for regulating casualised working relations, despite the profound divergence of their working arrangements from the standard model in both its traditional and flexible forms. Developing Bosch's analysis, it was suggested that in fragmented labour markets, a central role of labour regulation is to construct the standard model. This SER-constructive strategy should be a central element of the Specific Regulation approach, which is the regulatory strategy most attuned to grasping and reshaping the architecture of diverse non-standard work-forms. In consequence, the article has posited a critical role for labour law: to build the (flexibilised) Standard Employment Relationship from casualised work-forms. Reconstructive labour law would fuse into coherent working relationships the series of dispersed or unpredictable engagements characteristic of casual work.

This article is therefore implicitly calling for future regulatory reform projects to embody a unity of purpose. Reconstructive labour law demands specific regulation but mitigates against a proliferation of distinct regimes for each non-standard work-form. Diversity of working relations, that is to say, should not be assumed to demand a proliferation of regulatory models adrift from a notion of the optimum working relationship. Such fragmentation would tend to weaken regulatory frameworks. It is also worth recalling the early warnings against 'normalising' intrinsically precarious forms of work (Murray 1999). Tentatively, a lattice of generally applicable norms, specific standards and regulatory 'prompts' to standardisation is likely to be the most effective regulatory regime.

Some limitations to the analysis pursued in this article can be identified. Evidently, reconstructive legal techniques will not in isolation constitute effective regulation. They must be embedded in receptive legal frameworks that, in particular, support and promote collective regulation (see further McCann and Murray 2010, 2014). The article, further, has been confined to the conventional parameters of 'labour law,' rather than more broadly with labour market regulation (see further e.g. Arup et al 2006). These legal frameworks, however, function in tandem with adjacent regimes on migration, taxation, social protection, equality, family care etc., which may also conceivably be shaped to construct standard-type relationships, or at least not to undermine them. The scope of this article, finally, has been limited to the temporal, organizational, and remunerative dimensions of the Standard Employment Relationship. Future research efforts could usefully investigate the promise of other facets of the standard-model in the context of fragmented labour markets. It can be

suggested, for example, that the open-ended contract is likely to be the most protective mould for working relations over longer time-periods, although further investigation is needed.

Despite these limitations, a number of conclusions can be drawn. Certain of these conclusions reinforce prior contributions. First, the evolving project of domestic work regulation should be recognised as one of the critical regulatory projects of the early twenty-first century, with wide-ranging repercussions for the labour market status of women, the effective regulation of care work, and efforts towards formalisation of unregulated labour markets (McCann 2012; McCann and Murray 2014). Second, non-standard work norms should be evaluated holistically, by examining their repercussions for labour law regimes as a whole (McCann 2012). This article has pursued such a holistic analysis in arguing for the enduring relevance of the Standard Employment Relationship and for a reconstructive role for labour market regulation. At an abstract level, a modernised Standard Employment Relationship, in its temporal dimensions, should be preserved as an image of a meaningful working life in an era in which such notions are rapidly being discarded, especially for the lower end of the labour force. More concretely, the model is available as an envisaged outcome of labour regulation in settings in which labour law frameworks now neglect large portions of the working population or float adrift from the vast majority of the working population.

Finally, a suggestion can be made for future research. In investigating the evolution of labour law, including its gender dimensions, it would be useful to classify and consider together what may be termed ‘highly fragmented labour markets.’ These may be defined, tentatively, as labour markets (1) in which a substantial proportion of the labour force is engaged in non-standard working arrangements and/or (2) in which there is a substantial presence of the most profoundly casualised forms of employment. The underlying intuition is that it would be useful for comparative projects to investigate together the market-oriented regimes of the North and the fragmented labour markets of low-income countries, to generate insights into the regulation of casualised and informal work across a range of income levels.

Reference List

Arup, Christopher, Gahan, Peter, Howe, John, Johnstone, Richard, Mitchell, Richard and O'Donnell, Anthony (eds) (2006) *Labour Law and Labour Market Regulation* Sydney: The Federation Press

Bosch, Gerhard (2004) 'Towards a New Standard Employment Relationship in Western Europe', *British Journal of Industrial Relations* 42: 617-36

Burchell, Brendan, Deakin, Simon and Honey, Sheila (1999) *The Employment Status of Individuals in Non-standard Employment*. London: Department of Trade and Industry (UK)

Canada (2006) *Fairness at Work: Federal Labour Standards for the 21st Century*, prepared by Arthurs, Harry W. Ottawa: Human Resources and Skills Development Canada

Clement, Wallace, Mathieu, Sophie, Prus, Steven and Uckardesler, Emre (2009) 'Precarious Lives in the New Economy: Comparative Intersectional Analysis' in Vosko, Leah F., MacDonald, Martha and Campbell, Ian (eds) *Gender and the Contours of Precarious Employment*. London and New York: Routledge, 240-255

Commission of the European Communities (2003) *Report by the Commission's Services on the Implementation of Council Directive 97/81/EC of 17 December 1997 concerning the Framework Agreement on Part-Time Work Concluded by UNICE, European Centre of Employers and Enterprises Providing Public Services (CEEP) and the European Trade Union Confederation (ETUC)*. Brussels: Commission of the European Communities

Countouris, Nicola and Horton, Rachel (2009) 'The Temporary Agency Work Directive: Another Broken Promise?' *Industrial Law Journal* 38: 329-38

Davies, ACL (2007) 'The Contract for Intermittent Employment,' *Industrial Law Journal* 36: 102-118

Department for Business, Innovation and Skills (2014) 'Government Crackdown on Zero Hours Contract Abusers', available at <https://www.gov.uk/government/news/government-crackdown-on-zero-hours-contract-abusers> [last accessed 15 July 2014]

European Parliament (2010) *Legislative Resolution of 20 October 2010 on the Proposal for a Directive of the European Parliament and of the Council Amending Council Directive 92/85/EEC on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding*. Luxembourg: European Parliament

Ewing, Keith (ed) (1996) *Working Life. A New Perspective on Labour Law*. London: Institute of Employment Rights

Fenwick, Colin, Howe, John, Marshall, Shelley and Landau, Ingrid (2007) *Labour and Labour-Related Laws in Micro and Small Enterprises: Innovative Regulatory Approaches*. Geneva: ILO

Fredman, Sandra (1997) 'Labour Law in Flux: The Changing Composition of the Workforce,' *Industrial Law Journal* 26: 337-52

Frey, Diane F (2011) 'A Diagnostic Methodology for Regulating Decent Work' in Lee Sangheon and McCann, Deirdre (eds) *Regulating for Decent Work: New Directions in Labour Market Regulation*. Basingstoke/Geneva: Palgrave MacMillan/ILO, 339-64

Fudge, Judy and Owens, Rosemary (eds) (2006) *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms*. Oxford/Portland Oregon: Hart

Gosh, Jayati (2013). *Economic Crises and Women's Work: Exploring Progressive Strategies in a Rapidly Changing Global Environment*. New York, NY: UN Women

Hepple, Bob (1995) 'The Future of Labour Law,' *Industrial Law Journal* 24: 303-22

Howe, John (2006) "'Money and Favours": Government Deployment of Public Wealth as an Instrument of Labour Regulation' in Arup et al, 167-86

International Labour Organization (2013) *Domestic Workers Across the World: Global and Regional Statistics and the Extent of Legal Protection*. Geneva: ILO

_____ (2012) *Eurozone Job Crisis: Trends and Policy Responses*. Geneva: International Institute of Labour Studies

_____ (2011) *The Global Crisis: Causes, Response and Challenges*. Geneva: ILO

_____ (2009) *Decent work for Domestic Workers. Report IV(2), International Labour Conference, 99th Session*. Geneva: ILO

_____ (1999). *Decent Work* Geneva: ILO

_____ (1994). *Record of Proceedings International Labour Conference 81st Session*. Geneva: ILO

Lee, Sanheon and McCann, Deirdre (eds) (2011) *Regulating for Decent Work: New Directions in Labour Market Regulation*. London/Geneva: Palgrave Macmillan/ILO, 2011

McCann, Deirdre (2012) 'New Frontiers of Regulation: Domestic Work, Working Conditions and the Holistic Assessment of Non-Standard Work Norms' *Comparative Labor Law and Policy Journal*, 34(1): 167-92.

_____ (2008) *Regulating Flexible Work*. Oxford: Oxford University Press

McCann, Deirdre, Lee, Sangheon, Belser, Patrick, Fenwick, Colin, Howe, John and Luebker, Malte (2014) *Creative Labour Regulation: Indeterminacy and Protection in an Uncertain World*. London/Geneva: Palgrave Macmillan/ILO

McCann, Deirdre and Murray, Jillian (2010) *The Legal Regulation of Working Time in Domestic Work*. Geneva: ILO

McColgan, Aileen (2000) 'Recent Legislation: Missing the Point? The Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (SI 2000, No 1551)', *Industrial Law Journal* 29: 260–67

Murray, Jillian (1999) 'Normalising Temporary Work,' *Industrial Law Journal* 28: 269–75.

Rubery, Jill (2011) 'Reconstruction Amid Deconstruction: Or Why We Need More of the Social in European Social Models', *Work, Employment and Society* 25: 658-74

Tzehainesh Tekle (ed) (2010) *Labour Law and Worker Protection in Developing Countries*. Oxford: Hart, 51-91

Vosko, Leah F (2011) 'Precarious Employment and the Problem of SER-Centrism in Regulating for Decent Work' in Lee and McCann, 56-90

_____ (2009) 'Less than Adequate: Regulating Temporary Agency Work in the EU in the Face of an Internal Market in Services' *Cambridge Journal of Regions, Economy, and Society* 2:1-17

_____ (2006) 'Gender, Precarious Work, and the International Labour Code: The Ghost in the ILO Closet' in Fudge and Owens